UNITED STATES – CERTAIN MEASURES AFFECTING IMPORTS OF POULTRY FROM CHINA

(WT/DS392)

U.S. COMMENTS ON CHINA'S ANSWERS TO THE SECOND SET OF QUESTIONS POSED BY THE PANEL

April 20, 2010

TABLE OF REPORTS CITED

Short Form	Full Citation
Australia – Salmon (AB)	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998
Japan – Apples (AB)	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003
US – Hormones Suspension (AB)	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008

Question 84

China indicated at the first substantive meeting that it was no longer challenging the "Moratorium". However, throughout its answers to questions, second written submission, and second oral statement, China refers repeatedly to Section 733. Is China asking for the Panel to make findings with respect to Section 733?

(a) Possible follow up - On what basis does China believe Section 733 is within the Panel's terms of reference?

1. In its response to Question 84, China mischaracterizes the effect of Section 733 and Section 727, implying that both measures prevented FSIS from taking action related to China's equivalence application while they were in effect. China's position is inconsistent with its earlier statement that "the legal impact of a funding restriction is limited to its express terms."[1] Based on this principle of U.S. law, the legal impact of these measures was limited to their explicit terms. Thus, all they prohibited was the use of funds to establish a rule related to slaughtered poultry from China and the use of funds to implement a rule related to processed poultry from China. FSIS could and did conduct work related to China's equivalence application.[2]

2. China's answer also contradicts another fact China previously acknowledged; namely, that at the time China responded to the U.S. letter of December 20, 2007, FSIS would have needed to conduct an equivalence determination review of China's processed poultry inspection system before any poultry could have been exported to the United States. China has not disputed this fact and has previously characterized it as one of many complex and lengthy "additional procedural steps."[3] Yet, now, China ignores the need for this review, instead claiming that the U.S. failure to respond to its March 2008 letter is due to some other issue – Section 733 in particular. China cannot have it both ways. It cannot argue that the equivalence determination review is of significance when convenient and then ignore it when it is no longer convenient to acknowledge. As the United States has noted, the reason that FSIS did not respond to this letter from China was due to the need to conduct this review, and any implication to the contrary is incorrect.[4]

Question 86

Please indicate whether you agree that the chronology of events attached in Annex A is correct. If you do not agree, please submit any corrections to the chronology in the form of an attachment to your answers.

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[1] China Second Written Submission, para. 32.

[2] U.S. Second Written Submission, paras. 18-21.

[3] *See* China Second Written Submission, para. 55, where China characterizes the equivalence determination review as lengthy and complex when trying to prove that Chinese poultry does not pose an imminent risk to life and health.

[4] U.S. Response to the Second Set of Questions from the Panel, para. 4.

3. China appears to have misread Question 86. As the United States understands it, this question asked the Parties to comment on whether "the chronology of events attached in Annex A was correct" and did not invite the Parties to add numerous items to the chronology. Had the question been phrased as China seems to have read it, the United States might have asked the Panel to add China's numerous massive food safety crises and the release of reports from reputable international institutions condemning China's food safety system to the chronology. However, instead of suggesting the addition of numerous items at this stage of the proceeding, the United States would simply request that the Panel not accept the following additions proposed by China: 15(a), 16(a), 17(a), 17(b), 23(a), 25(a), and 28(a).

4. The United States also notes that most of China's suggested additions appear intended to prove that the United States has long been aware of China's new food safety law. The United States has not ever and does not now dispute this point. Not only does Section 727's Joint Explanatory Statement explicitly reference China's comprehensive overhaul of its food safety system,[5] but the United States even attached an English language translation of the law as an exhibit to its First Written Submission.[6]

5. However, U.S. awareness of China's new food safety law does not excuse China from providing copies of the law and its implementing regulations to FSIS and from explaining how they affect China's poultry inspection systems. FSIS's standard equivalence procedures require that any country that is equivalent or that is seeking equivalence take this step, and this requirement makes sense. After all, FSIS cannot determine whether a given poultry inspection system is equivalent if it does not fully understand the exporting country's laws and regulations and does not understand their implications for the exporting country's poultry inspection system. And given that China is undertaking a massive food safety overhaul that began in February 2009 and is still underway (China was implementing new regulations as late as December 2009), FSIS cannot move forward with China's equivalence application until China responds to its request for information. This simple fact is not altered by U.S. awareness of China's new law.

6. FSIS's need for additional information is also not altered by the meeting referenced in China's addition of event 24(a). While it is true that the Director of the Import and Export Food Safety Bureau of AQSIQ did visit Washington in September 2009 to discuss China's Food Safety Law, the meeting focused on how China's food safety overhaul would affect access to China's market for U.S. agricultural products. There was no discussion of how China's overhaul affected

[5] Exhibit CN-33.

[6] Exhibit US-40.

its poultry inspection systems and its equivalence for poultry. Thus, as with China's other suggested additions, the occurrence of this meeting proves nothing.[7]

7. With regard to China's suggested edit to event 4, the United States does not in general dispute China's addition. However, as the United States noted in its response to Question 86, any preliminary equivalence determination is not final until after the rulemaking is complete. Thus, China's suggested addition, if accepted by the Panel, should be altered to read "FSIS announced to China that in December 2004, FSIS ~~found~~ made a preliminary determination that China's processed poultry inspection system was equivalent pending written confirmation of two changes requested by FSIS and FSIS's rulemaking process.

Question 89

Can a JES direct an executive branch agency to take particular actions?

8. The United States has already explained in detail the limited effect of Section 727 and will not do so again here.[8] However, the United States would simply note that China's contention that FSIS would only apply FSIS procedures to China "after the extraordinary restriction had been lifted by Congress upon expiration of Section 727" is inaccurate. FSIS was permitted to take actions under the PPIA while Section 727 was in effect, including, *inter alia*, the document review step.

Question 91

During its response to the questions in the second substantive meeting, the United States argued that Congress could have enacted measures which would have been more trade restrictive than Section 727. Is this enough to prove that Section 727 was the least trade-restrictive measure that Congress could have enacted to achieve its policy objective?

9. In its response to Question 91, China relies on the report of the Appellate Body in *Brazil – Tyres* for support in importing into Article XX the notion of "least trade restrictive." In addition to the concerns raised by the United States in its response to Question 91, the United States notes that it has concerns with the way in which the Appellate Body expressed its analysis in *Brazil – Tyres*. The United States expressed those concerns at the DSB meeting at which that Appellate Body report was adopted, stating:

[7] The United States would also note that if China were to allege that this meeting did involve a discussion of how China's new food safety law impacted its poultry equivalence, this would directly undermine its continued inaccurate assertion that FSIS could not take actions related to China's equivalence while Section 727 was in effect.

[8] *E.g.*, U.S. Opening Statement at the Second Panel Meeting, paras. 10-12.

On reflection, however, the United States would like to express its reservations about certain aspects of the Appellate Body's Report. First, the United States wished to express its concern that certain parts of the Report could be read to suggest that Members must rank various measures according to their relative degree of "trade-restrictiveness" (see, for example, paragraph 179 of the Report). As the United States had stated on previous occasions, it did not see any textual support for a construction of the word "necessary" in GATT Article XX(b) that would give rise to such an analysis. There was nothing in the ordinary meaning of "necessary" that would support a "trade restrictiveness" analysis. Nothing in Article XX(b) used the term "trade" or "restrictive".

At the same time, the analysis used in these parts of the Report was remarkably similar to that called for under Article 5.6, including footnote 3, of the SPS Agreement. As a result, these parts of the Report could be misunderstood as incorporating into Article XX(b) a "least trade restrictive" obligation similar to that specifically negotiated as part of the SPS Agreement. The United States recalled that those SPS negotiations had been complicated and sensitive. Yet no such obligation had been negotiated or agreed to in the context of Article XX(b). Indeed, it was difficult to see what role would be left for the language in the chapeau to Article XX concerning "disguised restriction on trade" if "necessary" were to have the meaning ascribed to it in certain parts of the Report. The United States could not see how it was appropriate to read into Article XX(b) a requirement that did not appear there. And the United States recalled that in its Report in the Gambling dispute (DS285), when considering the GATS provision that was similar to GATT Article XX, the Appellate Body had clarified that Members were not required to "identify the universe of less trade-restrictive alternative measures," and that the issue was whether the complaining party had identified a reasonably available WTO-consistent alternative. The United States was also concerned with the references to "the importance of the interests or the values underlying the objective pursued by" the measure (see, for example, paragraph 210 of the Report). These references could be misconstrued as suggesting that WTO Panels and the Appellate Body were to rank by degree of importance the various policies pursued by Members and afforded Members greater ability to pursue some policies over others. Nothing in Article XX assigned this rather subjective function to the dispute settlement system.

The United States had concerns about the Appellate Body's application of the term "level of protection" in this Report. The term "level of protection" was not found in the text of Article XX(b) of the GATT, but only in certain other WTO Agreements. Accordingly, it appeared, at a minimum, confusing to use this term in the context of a review under Article XX. Adding to that confusion, the United States would not expect that the term should be used differently in this context, when a panel was assessing whether a measure was necessary to protect human health, than it would be used in those contexts where the term was found in the text of the agreement. In this connection, however, the United States noted that the Appellate Body had accepted Brazil's description of its "level of

protection" as the "reduction of the risks of waste tyre accumulation to the maximum extent" (see, for example, paragraph 144 of the Report). That statement, however, appeared to confuse a chosen level of protection against risks to human health with the measure to be employed to address such risks. In other words, the "risk" at issue was the risk to human life or health from malaria or other identified risks, and the level of protection should refer to the level of protection from such risks. The references to the reduction of waste tyres appeared to shift the focus to how to reduce waste tyres rather than how to reduce malaria or other risks, and thus might become circular. That was, the analysis verged on becoming: "If a measure reduces waste tyres then it is 'necessary' because the measure helps reduce waste tyres." Finally, some of these difficulties might be due to the approach of treating the import ban and the Mercosur exemption separately. As the United States had explained in its submissions to the Appellate Body, it remained unclear to the United States how the import ban and the Mercosur exemption could be analyzed separately in this dispute when they appeared to be all part of the same measure.[9]

10. If anything, China's response to Question 91 only confirms the validity of the U.S. concerns, since China appears to be importing into Article XX of the GATT 1994 the provisions of Article 5.6 of the SPS Agreement. However, China's approach is contrary to the customary rules of interpretation – it finds no support in the ordinary meaning of the terms used in Article XX in context and in light of the object and purpose of the GATT 1994, and in fact would appear to render Article 5.6 of the SPS Agreement inutile.

Question 92

In paragraph 20 of its second submission, China argues that "[a] less trade restrictive approach that would have contributed to the US objective would have been to apply normal FSIS procedures". The Appellate Body in US – Gambling (paragraph 317) determined that a proposed alternative measure whose results were uncertain was not capable of comparison with the challenged measures.

(a) Isn't the outcome of the equivalence determination by FSIS uncertain?

(b) In this sense, how are FSIS procedures a reasonably available alternative procedure?

11. The underlying question in an equivalence determination is whether China's measures achieve the appropriate level of protection ("ALOP") of the United States. The Panel is correct that there is no guarantee that the United States will determine that China's measures are equivalent. China avoids responding to the Panel's question by shifting its discussion to the

[9] DSB, *Minutes of Meeting Held on 17 December 2007*, WT/DSB/M/243 (circulated 15 February 2008).

abstract, discussing not the uncertainty of the determination with respect to China's measures, but only asserting in the abstract that a finding of equivalency for another Member's measures would mean that poultry from that other Member would be permitted entry into the United States.[10] This is tautological and not a response to the Panel's question. Accordingly there is nothing to indicate that there would be any more imports from China in the absence of Section 727 than in its presence, and therefore nothing to say that China's "alternative" is "less trade restrictive."

12. Further, China's suggestion that the United States "apply normal FSIS procedures" is not an alternative at all, but rather another way of saying that Section 727 was not necessary. As the United States has previously noted, given the unique challenges posed by China's equivalence application and the fact that FSIS had never before been confronted with a similar challenge, Section 727 was necessary to achieve the U.S. ALOP.[11] The procedures that China characterizes as "normal," were not enough alone in order to do so given these circumstances.

13. Finally, China's attempts to distinguish the current situation from *US – Gambling* are unconvincing. China's answer is flawed in two respects: First, it fails to acknowledge that FSIS may not find China's inspection systems equivalent; second, it wrongly implies that the legal impact of Section 727 was to deny China access to FSIS procedures. As the United States has pointed out on numerous occasions, FSIS needed to conduct an equivalence determination review for China's processed poultry inspection system and FSIS had never actually made a final determination that China's poultry slaughter inspection system was equivalent.[12] China ignores this uncertainty with regard to these determinations. Additionally, Section 727's effect was not to deny China access to the PPIA, but simply to limit the use of funds for the narrow steps of "establishing" and "implementing" equivalence rules, which are only one part of FSIS's equivalence procedures.

Question 99

What is the relationship between Article 4 and Articles 2.2 and 2.3 of the SPS Agreement? Are Articles 2.2 and 2.3 on the one hand, and Article 4 on the other hand mutually exclusive?

14. China's responses to this series of questions concerning the SPS Agreement demonstrate that China is fundamentally wrong in its conceptual approach and does not understand the basic idea of an equivalence determination or how such a determination fits within the structure of the SPS Agreement.

[10] *E.g*, China Responses to the Second Set of Questions from the Panel, para. 14.

[11] U.S. Second Written Submission, paras. 66-68.

[12] U.S. First Written Submission, paras. 47-48 and fn. 56.

15. Fundamentally, equivalence is directed as addressing the following problem. An exporting Member could utilize SPS measures identical to those of the importing Member in order to achieve the importing Member's ALOP. For example, the exporting Member could ban the same substances or apply the same residue level for a particular substance. In that situation, there would not be a need for an equivalence determination.

16. However, in many instances the measures of an exporting Member will differ from those of the importing Member, and indeed differ from those of other Members exporting to the importing Member. A Member's obligations under the SPS Agreement apply with respect to the measures *of that Member*. They do not apply with respect to *another Member's measures*. For example, there is no requirement that the United States base *China's* SPS measures on a risk assessment or ensure that *China's* measures are not more trade restrictive than required. Therefore it is not surprising that the provisions of the SPS Agreement generally do not lend themselves to China's claims.

17. The exception to this is that the SPS Agreement does require an importing Member to accept as equivalent to its measures the measures of an exporting Member where that exporting Member has objectively demonstrated to the importing Member that its measures achieve the importing Member's ALOP. This obligation is found in Article 4. And fundamentally, in this dispute, China's complaint is with respect to whether the United States has properly fulfilled its obligation under Article 4. Yet *China has made no claim under Article 4*. Instead, China has made claims under a series of other provisions of the SPS Agreement. China's responses to the Panel's questions only serve to demonstrate further that China is seeking to distort the provisions of the SPS Agreement to make them fit a situation they were never negotiated to fit and that they do not fit.

18. Members negotiated Article 4 to deal with the situation of equivalency determinations. China would like the Panel just to completely ignore the specific, agreed text directed at equivalency determinations and try to read into other provisions of the SPS Agreement obligations directed at equivalency determinations. Not only is this incorrect as a matter of treaty interpretation, it risks distorting these other provisions of the SPS Agreement and renders Article 4 superfluous.

19. In an area, such as this, dealing with the fundamental government objective of protecting human health, it is all the more important for the WTO to proceed carefully and not to impute into the agreed text obligations that are not there and were never agreed. The balance between protecting human life and health and trade policy is a very sensitive one, reflected in both the SPS Agreement and Article XX(b) of the GATT 1994. China would disrupt that balance.

20. For example, China argues that there is an obligation to base the process for determining equivalency on a risk assessment. This is clearly in error. The requirement for a risk assessment applies to the <u>importing</u> Member's measures.

21. Similarly, the requirement in Article 5.6 only applies to the measures that an importing Member establishes or maintains to achieve its ALOP. It does not apply in this case to require the United States to ensure that *China's* measures are not more trade restrictive than required.

22. China confuses the obligation to accept another Member's measures as equivalent with SPS measures in general. The question with respect to equivalency is a fundamentally different question calling for a very different approach and conceptual framework. In the case of equivalency, the issue is not whether there is a risk that justifies the importing Member's SPS measures – this is taken as a given (and the United States notes that China has indicated it is not challenging the U.S. measures to ensure that poultry consumed in the United States is safe). The question is whether an exporting Member's measures, though different from the importing Member's measures, nonetheless achieve the importing Member's ALOP. And Article 4 explains what is to be the basis for this determination – an objective demonstration made by the exporting Member to the importing Member. China admits it has made no claim under Article 4. China has not claimed that for purposes of Article 4 there is something that prevents such an objective demonstration from being made or the United States from determining that China's measures are equivalent.

23. China's claim that Article 2.2 must apply to an equivalency determination or else an importing Member could reject equivalence without relying on any science[13] is simply inaccurate and ignores the "objectively demonstrates" language in Article 4.

24. Article 4 does not establish any particular process or requirements with respect to that objective demonstration or the equivalency determination. Yet China attempts to graft onto an equivalency determination an entire series of such requirements.

25. China never explains how a measure establishing certain procedures should be subject to disciplines under Articles 2.2 and 2.3. As the United States noted in its response to this question of the Panel,[14] it would be difficult to see why there would need to be scientific evidence for, or a basis in scientific principles for, any number of measures adopted in the context of an equivalence proceeding, such as the language, form, means of delivery, or number of copies of information submitted. And because the measures of various Members will be different, it is not surprise that the "objective demonstration" may require different information or different approaches that will necessarily flow from the particular circumstances of that equivalence proceeding, such as a request for clarification or follow-up with respect to particular information submitted by the other Member. There is unlikely to be a "one-size-fits-all" process for an importing Member to be able to determine if an exporting Member's measures are equivalent.

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[13] China Responses to the Second Set of Questions from the Panel, para. 30.

[14] U.S. Responses to the Second Set of Questions from the Panel, para. 27.

Question 100

China/United States: What is the relationship between Article 4 and Articles 5.1, 5.5 and 5.6 of the SPS Agreement? Are Articles 5.1, 5.5 and 5.6 on the one hand, and Article 4 on the other hand mutually exclusive?

26. China's response to Question 100 separately addresses Articles 5.1, 5.5, and 5.6; each of China's arguments is unconvincing.

27. First, China argues that a risk assessment under Article 5.1 is needed to evaluate the procedures used in an equivalence review. As shown by an examination of China's argument, this position is without merit. In particular, China contends that "such a risk assessment would examine whether particular testing, sampling, and auditing procedures used by an importing Member were related to a specific risk, and the likelihood of the spread of particular types of contamination and disease."[15] This proposition – insofar as it applies to procedures – is inconsistent with the SPS Agreement itself. (The second part of the sentence – regarding the spread of disease – is a *non sequitur*, as it does not involve the examination of procedures.)

28. In particular, Annex A(4) of the SPS Agreement contains a specific definition of "risk assessment":

> The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.[16]

Under the SPS definition, a risk assessment evaluates one of two things: either "the likelihood of entry, establishment or spread of a pest or disease," or "the potential for adverse effects on human or animal health." Nothing in this definition can be read to mean that a risk assessment – as China asserts – involves the evaluation of "particular testing, sampling, and auditing procedures." Again, China cannot explain how it makes sense under the SPS agreement to assert that procedures must be supported by a risk assessment.

29. To be sure, a Member's risk assessment may be examined to assess whether it meets the definition set out in the SPS Agreement, and whether the measure that achieves the Member's

[15] China Responses to the Second Set of Questions from the Panel, para. 34.

[16] SPS Agreement, Annex A(4).

ALOP is based on the risk assessment. But this is a very different inquiry than an examination of whether the procedures used by a Member to examine risk are supported by a risk assessment.

30. With regard to Article 5.5, China's argument makes the fundamental mistake of assuming that ALOPs can be set differently for products originating from different Members. As the United States has explained, an ALOP applies to particular risks within a Member's territory, and does not depend on the origin of the product that presents that risk.[17]

31. China's argument is based on the error of assuming the ALOP based on the measure at issue. As the Appellate Body explained, the determination of the ALOP is an initial and separate inquiry:

> [T]he determination of the level of protection is an element in the decision-making process which logically precedes and is separate from the establishment or maintenance of the SPS measure. In other words, the appropriate level of protection determines the SPS measure to be introduced or maintained, rather than the appropriate level of protection being determined by the SPS measure.[18]

32. One basic error in China's approach is that China assumes that because it may be possible to determine what level of protection a measure achieves, then that level of protection ("LOP") is by definition the ALOP established by a Member. But this reads out of the concept of an "appropriate level of protection" the element of being "appropriate." A LOP does not equal an ALOP. Not all LOPs are ALOPs. A measure may well achieve a level of protection different from the ALOP – this could be for example because something happens in the real world to change the LOP that is achieved, or the measure was not calibrated correctly to begin with. China's argument fails due to this conceptual error alone.

33. However, there is a further error. In essence, China's argument – by always implying an ALOP based on the measure at issue – would convert many claims that an SPS measure was not necessary to meet a Member's ALOP, or that a measure was discriminatory, into an Article 5.5 claim. This mode of analysis, however, is simply wrong: as the Appellate Body has noted, the establishment of the ALOP is separate from the measure that a Member uses to achieve that ALOP.

34. Finally, with regard to Article 5.6, China ignores the fact that in an equivalence process, it is the exporting Member (in this case, China) that adopts the measure that achieves a particular level of safety. China does not explain how it makes sense to examine whether the measures

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[17] U.S. Responses to the Second Set of Questions from the Panel, para. 65.

[18] *US – Hormones Suspension* (AB), para. 523 (citing *Australia – Salmon* (AB)) (footnotes and quotation marks omitted; emphasis added).

adopted by China are "more trade restrictive than necessary" to meet the United States ALOP for poultry products.

Question 104

China/ United States: Could the parties please comment on the relevance and legal value of the "Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures" (G/SPS/19/Rev.2) to the Panel's understanding of equivalence according to Article 4 of the SPS Agreement?

35. China's response to question 104 demonstrates that China does not understand the Decision. For example, China cites to paragraph 2 of the Decision as showing a supposed linkage between equivalence procedures and the need for a risk assessment for those procedures. But paragraph 2 is clear that it is intended to help the *exporting Member* make the objective demonstration called for under Article 4. The risk assessment referred to in paragraph 2 is "the risk assessment on which the sanitary or phytosanitary measure is based." In other words, paragraph 2 is aimed at helping the exporting Member understand the SPS measures being applied by the importing Member (such as maximum residue levels or veterinary testing). It says nothing about needing to base an equivalency determination on a risk assessment – indeed, that would not make sense for the reasons articulated above.

36. In addition, China – as did the United States – cites to the paragraph of the Decision stating that importing Members shall respond in a "timely manner" to equivalence requests from exporting Members. This language, however, does not refer to Annex C, for the simple reason (as the United States has explained) that Annex C applies to "control, inspection, and approval procedures" involving specific products, and does not address equivalence procedures under Article 4. Indeed, if Annex C did apply to Article 4 equivalence procedures, one would expect that the Decision would refer to Annex C and its "undue delay" standard; but the Decision contains no such reference.

Question 115

United States/China: Should the evidence provided by both parties related to news articles be considered scientific evidence for the purposes of the SPS Agreement?

37. China's response to Question 115 relies on the Appellate Body report in *US – Hormones Suspension*, but China fails to cite the more relevant elements of the Appellate Body's reasoning in that report. In particular, China discusses the scientific evidence involved in determining the risk from certain levels of hormones. But the kind of risk involved in the current dispute – involving the lack of enforcement of food safety laws – is different, and is not necessarily subject to laboratory analysis.

38. In fact, *Hormones Suspension* – like the present case – also involved the risk of non-enforcement of food safety laws. In particular, *Hormones Suspension* involved the risk that rules governing hormone administration would not be followed in practice, resulting in the misuse or abuse of these substances. The Appellate Body explained that these types of risks "are not necessarily or wholly susceptible of investigation according to laboratory methods of, for example, biochemistry or pharmacology."[19] And accordingly, the Appellate Body found that it was legal error for the Panel, in evaluating the risk assessment, to ignore evidence of abuse or misuse of the hormones that were covered by the measure at issue.[20]

39. As the United States has explained, the present dispute involves a procedural requirement used to evaluate equivalence, and as such, does not implicate the requirement under SPS Article 5.1 that the measure be based on a risk assessment. Nonetheless, the United States believes it is important that any discussion of SPS measures recognizes that the type of evidence used to evaluate a particular risk must be considered in context, taking account of the nature of that risk. As the Appellate Body explained in *Hormones Suspension*:

> It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.[21]

Question 116

Does China agree with the United States that its ALOP for poultry is expressed by Section 466 of the PPIA which is contained in Exhibit CN-04?

(a) In paragraph 34 of its second oral statement China argues that Section 727 applies aa different ALOP because it is separate and distinct from the PPIA and applies to China alone. What is the legal basis for concluding that based on these two factors, the ALOP applied in Section 727 could not be the same as the one in the PPIA?

40. As the United States explained,[22] ALOPs apply to specific risks, regardless of the country of origin. In China's response to Question 116, China asserts that its reasoning about a supposedly higher ALOP is based on *Australia – Salmon.* That dispute, however, in no way

[19] *US – Hormones Suspension* (AB), para. 544.

[20] *US – Hormones Suspension* (AB), para. 545.

[21] *US – Hormones Suspension* (AB), para. 527 (citing *EC-Hormones* (AB)).

[22] *See* U.S. Responses to the Second Set of Questions from the Panel, para. 65; Comments on China's Response to Question 100, *supra.*

supports China's reasoning. In particular, the Panel found that Australia had adopted different ALOPs for different types of imported fish – there was no finding that Australia had adopted a higher ALOP for salmon from Canada (the complaining party), as compared to salmon from any other jurisdiction.[23]

41. Furthermore, the United States would reiterate that Section 727 does not, as China allege, impose an "import ban" on Chinese poultry. Rather, the ban on imported poultry absent a finding of equivalence is established by the PPIA – a measure that China does not challenge. Section 727 does not preclude a finding of equivalence; rather, it is a procedural measure meant to ensure that China's food safety problems are fully considered in the process of determining equivalence.

Question 119

Is there such a thing as a "less than zero risk" ALOP?

42. As the United States noted in its response to this question, an ALOP cannot be a "less than zero" risk. In China's response, China supports its "less than zero risk" concept by positing the existence of a "product that has been scientifically confirmed to be 100% risk free," and then arguing that a ban on such a hypothetical product would result in a "less than zero" ALOP.[24] Both elements of China's theory are incorrect.

43. First, as a conceptual matter, there can be no product "that has been scientifically confirmed to be 100% risk free." Science can evaluate risks to varying degrees of precision, but it cannot be proven that any substance or product has absolutely no risk. Indeed, in the context of discussing the obligations under SPS Article 5.1, the Appellate Body has noted the existence of "theoretical uncertainty, that is to say, 'uncertainty that theoretically always remains since science can *never* provide *absolute* certainty that a given substance will not *ever* have adverse health effects.'"[25]

44. Second, if a ban is not needed to meet a Member's chosen ALOP, the ban could be challenged under the SPS Agreement on that basis. It is not correct, as China suggests, to impute a different, hypothetical ALOP based on the unnecessary measure, and then to convert the argument into an SPS Article 5.5 issue involving arbitrary or unjustifiable distinctions in ALOPs. Indeed, the very fact that China's analysis reached the illogical result of a "less than zero ALOP" shows the fallacy of China's attempt to distort the proper use of Article 5.5.

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[23] *See Australia – Salmon* (AB), paras. 154-158. Note that although China cites to both the Appellate Body report and the Panel Report, the imputation of the different ALOPs based on the particular Australian measures was not an issue that was subject to the appeal.

[24] China Responses to the Second Set of Questions from the Panel, para. 84.

[25] *Japan – Apples* (AB), para. 241 (citing *EC – Hormones* (AB), para. 186 (original italics)).

Question 124

In paragraph 40 of its second oral statement, China argues that it has "examined different measures and ALOPs applied by the United States to comparable situations." Can China please tell the Panel where in its prior submissions it has provided evidence of the specific SPS measures applied to "other food products" from China which reflect a different ALOP than that in Section 727.

45. In its response to Question 124, China continues to overlook the differences between FSIS and FDA procedures for ensuring the safety of imported food. As the United States has explained, FSIS operates under an equivalence regime that requires the proposal and establishment of a rule finding a particular country equivalent for a particular food product before that product can be imported, while FDA relies on "import alerts" and more rigorous border measures to ensure food safety.[26] Thus, comparing these systems to determine whether the same ALOP is applied in different circumstances is not appropriate. While Section 727 was necessary in the FSIS context to protect against the risk posed by Chinese poultry, FSIS's system of import alerts was necessary in the context of products regulated by FDA.

Question 125

China/United States: Prior panels and the Appellate Body have concluded that a finding of inconsistency with Article 5.5 would necessarily imply an inconsistency with Article 2.3. Do the parties agree with this interpretation?

(b) Both parties - if yes, please explain whether the text of Article 5.5 prohibits a type of discrimination not prohibited by Article 2.3.

46. In its response, China relies solely on the Panel and Appellate Body reports in *Australia – Salmon*. But in that dispute, there was *no finding* – comparable to the one China seeks here – that Australia was impermissibly discriminating between one product from Canada as opposed to another product from Canada. Rather, in that case, the Panel and Appellate Body examined whether distinctions in ALOPs in different situations (in that case, different types of imported fish products) amounted to a "disguised restriction on international trade."

47. Moreover, in *Australia – Salmon,* a key part of the inquiry was examining factors which showed that the measure was a "disguised restriction on trade." These factors included evidence of "domestic pressures to protect the Australian salmon industry"[27] and evidence of an "absence

[26] U.S. Second Written Submission, paras. 37-42.

[27] *Australia – Salmon* (AB), para. 170.

of controls on the internal movement of salmon products within Australia."[28] In short, the inquiry was focused on whether the Article XX exception was being abused through the adoption of a disguised restriction on trade. Here, China has not even alleged any factors that might show a disguised trade restriction. Indeed, as the United States has explained, a large segment of the U.S. domestic poultry industry opposed the adoption of Section 727.[29]

Question 133

China/United States: Do Article 8 and Annex C of the SPS Agreement cover control, inspection and approval procedures undertaken as part of an equivalence determination process? In your answer please address the fact that Article 8 requires Members to "ensure that their procedures are not inconsistent with the provisions of this Agreement", which includes Article 4 on equivalency determinations.

48. China now presents two arguments why Section 727 is subject to Annex C of the SPS Agreement: that the PPIA is a "control, inspection, and approval procedure"; or in the alternative, that Section 727 itself is a "control, inspection, and approval" procedure. Leaving aside the inconsistency of China's arguments on Section 727 (sometimes Section 727 is an "import ban," and when convenient, Section 727 is a "procedure"), China's arguments fail to come to grip with the fundamental point that – in the context of the SPS Agreement as a whole – "control, inspection, and approval procedures" involve the control, inspection, and approval of products, not a review of the equivalency of an exporting country's food safety measures.

49. As set out in the U.S. Second Written Submission,[30] the context provided by the specific types of obligations set out in Annex C make clear that the procedures covered in the Annex involve the inspection and evaluation of products, not safety enforcement regimes. China has never rebutted this analysis.

Question 147

What exactly was prohibited under Section 727? Could the FSIS expend funds to proceed with other aspects of the FSIS procedures that did not include publishing the final rule in the Federal Register?

50. In general, the United States refers the Panel to its response to Question 147, which explained the narrow scope of this provision. However, the United States would like to briefly comment on China's response as well.

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[28] *Australia – Salmon* (AB), para. 174.

[29] Exhibit US-55.

[30] U.S. Second Written Submission, paras. 119-125.

51. In particular, the United States would note that China suggests an overly broad interpretation of the terms "establish" and "implement." Contrary to China's suggestion, the "establishment" of a rule does not include the initial document review and on-site audits, but only refers to the steps directly related to the publication of a rule in the Federal Register finding China equivalent for poultry.[31] If the Panel were to accept China's proposed definition, Section 727 would be internally inconsistent because the measure would have prohibited FSIS from taking steps that are explicitly listed in the JES based on Congress' expectation that these steps would indeed be taken.

52. Similarly, China is incorrect to assert that the "implementation" of a rule encompasses a similar broad range of activities.[32] To the contrary, to "implement" a rule in the context of Section 727 simply means to certify Chinese plants as eligible to export to the United States, nothing more.

[31] China Responses to the Second Set of Questions from the Panel, para. 156.

[32] China Responses to the Second Set of Questions from the Panel, para. 156.